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IN THE

Supreme Court of the United States

October Term, 1968.

No. 83 ~~1840, Miscellaneous.~~

HARRY C. SCHWARTZ and ABRAHAM SIEGEL,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT IN OPPOSITION

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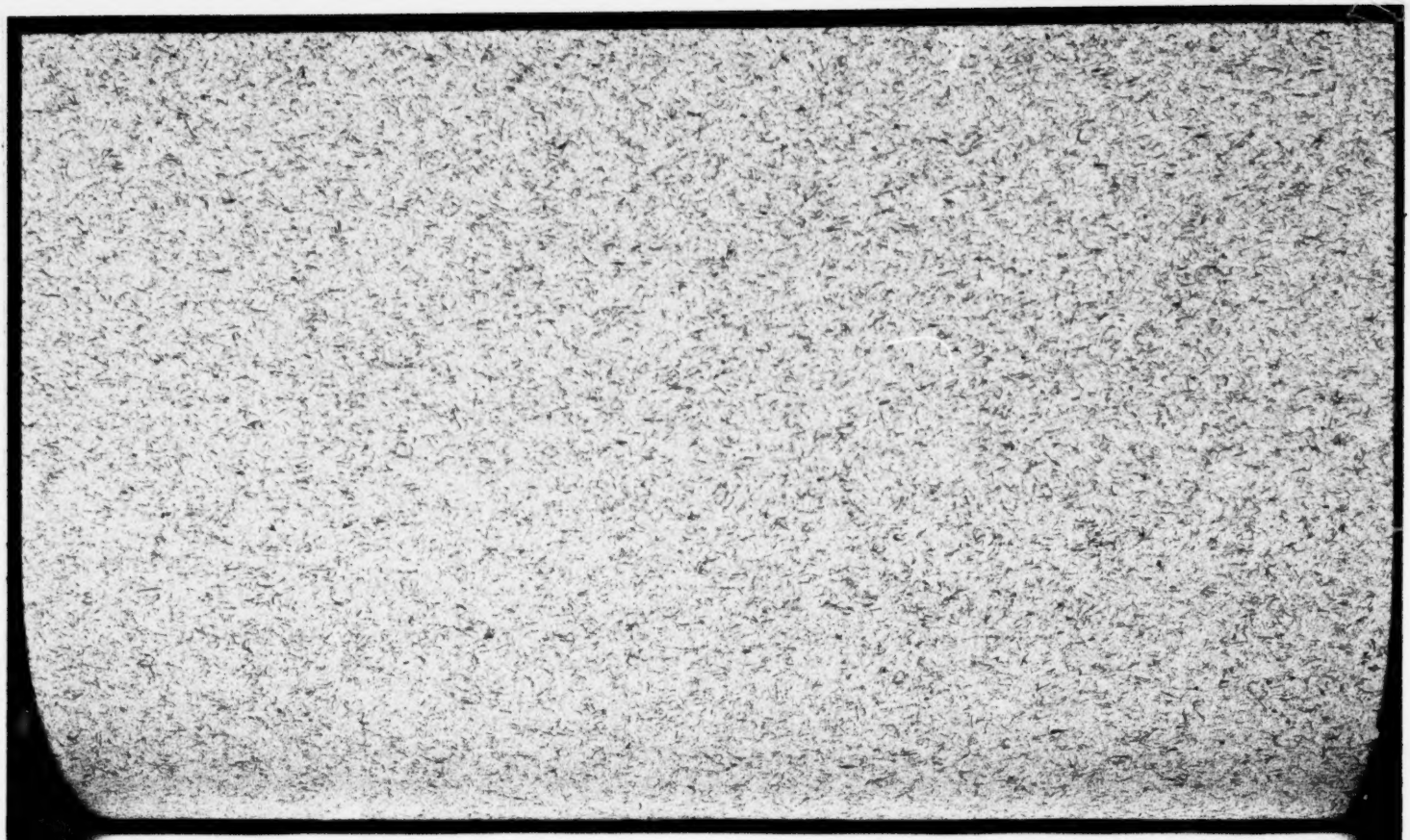

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JURISDICTION.

Petitioners assert that jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3). Respondent contends that, except with respect to question one on behalf of petitioner Siegel, this case presents no questions involving any right, privilege, or immunity set up under the Constitution of the United States.

QUESTIONS PRESENTED.

1. Did the admission into evidence at petitioners' joint trial of the unsworn statement of petitioner Schwartz, which contained some mention of petitioner Siegel, constitute a violation of petitioner Siegel's constitutional rights under the due process clause of the fourteenth amendment to the United States Constitution and under the sixth amendment of the United States Constitution despite the paucity of references, presence of limiting instructions, and overwhelming evidence against petitioner Siegel?

2. Did the conviction of petitioner Harry Schwartz of the common law offenses of misbehavior in office, official oppression and malfeasance as a magistrate of the City of Philadelphia constitute a violation of petitioner's constitutional rights under the ex post facto and due process clauses of the United States Constitution despite the fact that these crimes had long existed in Pennsylvania?

3. Did the affirmance by the Pennsylvania Supreme Court of petitioner Siegel's convictions by an equally divided vote of 3-3, violate petitioner's constitutional rights under the fourteenth amendment to the United States Constitution?

STATEMENT.

Having been tried to a jury before the Honorable John J. McDevitt of the Court of Quarter Sessions of Philadelphia County, one or both of petitioners Harry C. Schwartz and Abraham Siegel were found guilty on fourteen indictments charging cheating by false pretense, conspiracy and malfeasance in office. The crimes charged in the indictments were committed while petitioner Schwartz was a magistrate and petitioner Siegel a constable.

The gist of the charges was that petitioners had conspired to abuse the powers of their respective offices to cheat, defraud and extort defaulting debtors by adding illegal costs and interest to their debts and that they had put this nefarious and oppressive scheme into effect for private gain in utter disregard of, and insult to, the principles of law and public justice.

The evidence disclosed that in 1955 Schwartz, then a constable, appointed Abraham Siegel as his deputy constable. In 1957 both were elected constables of Philadelphia's 49th Ward. In 1960 Schwartz was appointed as a magistrate and later duly elected as a magistrate in 1962. Siegel was re-elected constable in 1964 (R. 182a-188a).

At the time when Siegel first entered the picture in 1955, the then Constable Schwartz was also a sole proprietor carrying on a business of collecting debts under the trade name of Active Collection Agency (R. 190a). After he resigned as constable on December 29, 1960, having become a magistrate as of December 23, 1960 (R. 191a), there appeared a new corporation in Pennsylvania, the Active Collection Agency, Incorporated, whose business was collecting debts and whose president was Schwartz's wife and whose treasurer was Siegel (R. 193a). Mrs. Schwartz held 75% of the common stock and Siegel 25% (R. 225a).

The new corporation was a most successful enterprise. Its tax return for 1961 showed gross receipts of $48,574.83;

for 1964 $86,605.55. Mrs. Schwartz's income from the corporation rose from $5,200 in 1961 to $18,785.94 in 1964; Siegel's from $4,765.78 in 1961 to $15,462.28 in 1964 (R. 226a-230a).

Meanwhile, the thought had occurred to many citizens of Philadelphia that all was not well with the minor judiciary. An attempt to establish a special investigating grand jury foundered, *Smith v. Gallagher*, 408 Pa. 551 (1962), but eventually, in October, 1964 the Attorney General of the Commonwealth initiated his own investigation. During the course of that investigation the books and records of every one of the twenty-eight magistrates' courts were reviewed and depositions were taken of 26 of the 28 magistrates. Arrangements for these depositions were made through the Chief Magistrate and the Solicitor to the Board of Magistrates (R. 134a-135a).

It is not disputed that on January 25 and 26, 1965, agents of the Department of Justice and Special Assistant Attorneys General reviewed many records and papers in Magistrate Court No. 11, the court in which petitioner Schwartz presided. During that time, with the full knowledge of petitioner Schwartz and in the presence of his two clerks and a constable, agents of the Department of Justice made photostatic copies of certain jackets. These jackets were described at the hearing on petitioners' motions to suppress as envelopes on the outside of which are listed the number of a case filed in the court, the plaintiff and the defendant, the hearing date; inside the jacket any papers pertaining to the case are filed.

At trial, the magistrates' dockets, pertaining to the civil cases which were the subject of the suppression hearing, were produced. Examination of these dockets revealed that Magistrate Schwartz had failed to record the proceedings which occurred in those cases. As a result, the jackets contained the only record of the court's activity. The clerk of that court had been subpoenaed to produce the jackets themselves and he failed in most cases to do so. Therefore,

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the court admitted into evidence the photostatic copies which the Commonwealth had made (R. 603a).

Also at trial, certain admissions which Harry C. Schwartz had made during his unsworn testimony going to his wife's participation in Active Collection Agency and his benefit therefrom, were offered the accepted into evidence against him alone under the usual cautionary instructions (R. 804a).

It is also undisputed that on January 26, 1965, Magistrate Harry C. Schwartz gave unsworn testimony in response to questions asked of him by the attorneys for the Department of Justice. The deposition started as follows:

> May the record show that we are present in office of Magistrate Harry C. Schwartz on the southwest corner of 12th and Callowhill Streets, and present are Magistrate Schwartz, the court reporter, and myself (Arlen Specter), and in the outer office at the present time are Assistant Counsel, John P. Mason, and Edwin Naythons, and also Trooper Paul Barrouk, Special Agent Glen Johnston, Jr., who are examining the dockets and records. We are here today pursuant to arrangements set up by the Solicitor to the Board of Magistrates, and we are going to ask questions of Magistrate Schwartz in the same form that we have asked other Magistrates under an arrangement worked out between Chief Magistrate Walsh and my office in October, and this session will be unsworn, with my asking certain questions and inviting the responses of Magistrate Schwartz.

At the conclusion of the deposition, Magistrate Schwartz stated:

> Before you conclude may I say this to you, put this in the record.
>
> I just want it to be known that Mr. Specter and Mr. Mason have been most fair in the interrogation of myself . . .

The conspiracy proved at trial showed a predatory scheme whereby various creditors forwarded their small delinquent accounts to the Active Collection Agency for collection on a commission basis of twenty to twenty-five percent of the amounts collected (R. 199a-222a). None of the creditors authorized the collection of interest or, for that matter, any sums in excess of the principal sum to be collected (R. 211a, 303a).

In all the instances presented to the jury the Commonwealth proved that the Active Collection Agency added to the principal sum arbitrary interest amounts of either $1.50, $2.50, $3.50, or $4.50 and equally arbitrary and completely illegal costs of $7.50 or $9.00 and mileage for distances not travelled (R. 754a-800a, 844a-861a). In all these cases Magistrate Schwartz sat in judgment. Constable Siegel executed the judgments, often without a levy and, thus, the poor people dunned were finally compelled to pay amounts greatly in excess of what they legally owed. The creditors alone, of those upon whose lives the Active Collection Agency impinged were treated honestly. They got what they bargained for but did not share in the excess charges.

Upon proof of this vicious scheme by which magistrate and constable conspired to prey upon the poor debtors of Philadelphia, the jury found petitioners guilty upon all fourteen indictments.

Extensive motions for new trial or in arrest of judgment were filed, briefed and argued before a court en banc consisting of the trial judge and the Honorables Alexander F. Barbieri and Edmund B. Spaeth, Jr. The motions were denied and petitioners were sentenced to a total of 11 to 23 months in the Philadelphia County Prison and to pay a fine in the total amount of $10,000 for petitioner Schwartz and $5,000 for petitioner Siegel.

Petitioners thereupon appealed to the Superior Court of Pennsylvania which, after briefing and oral argument, affirmed by a vote of 6-0, one judge disqualifying himself.

Further appeal was sought and allowed by the Supreme Court of Pennsylvania. Again after further briefing and oral argument that Court affirmed. With respect to petitioner Schwartz, the vote was 5-1, with respect to petitioner Siegel the vote was 3-3. A petition for reargument was filed and answered and, on January 8, 1969, denied by the Supreme Court of Pennsylvania.

A petition for a writ of certiorari to the Supreme Court of Pennsylvania was thereupon filed and this response ordered by the Court.

ARGUMENT.

I. THE DECISION OF THE PENNSYLVANIA SUPREME COURT IS NOT CONTRARY TO THE DECISIONS OF THIS COURT IN BRUTON V. UNITED STATES AND ROBERTS V. RUSSELL.

Bruton v. United States, 391 U. S. 123 (1968) held that because of the substantial risk that a jury, despite instructions to the contrary, will look to incriminating extrajudicial statements of a co-defendant in determining another defendant's guilt, admission of the co-defendant's confession incriminating another defendant at their joint trial violates the second defendant's right of cross-examination secured by the confrontation clause of the sixth amendment. In *Roberts v. Russell*, 392 U. S. 293 (1968), this Court determined that the *Bruton* principle was applicable to the states through the fourteenth amendment and was retroactively applicable to trials conducted prior to *Bruton*.

Petitioner Siegel contends that the introduction of Schwartz's extrajudicial statement at petitioner's joint trial, during which Schwartz did not take the stand, was prejudicial to him in that it violated the principle enunci-

ated in *Bruton* and deprived him of due process of law guaranteed by the fourteenth amendment. Petitioner Schwartz also submits that he was deprived of due process by admission of his own statement.

The portions of Schwartz's transcribed statement which were read to the jury indicated that Schwartz was unsure whether Siegel had any stock in Active Collection Agency or what position Siegel held in the organization that Siegel's salary rose (from $50 per week) after Schwartz was appointed Magistrate that Siegel actually ran the business that Siegel got the Bell Telephone Company cases and, that it was Siegel's office that added on the interest to the claims, all matters overwhelmingly proven by other evidence. Petitioners would have this Court reverse their convictions on the ground that the introduction of this evidence to the jury "clearly had the effect of inculpating Constable Siegel in a conspiracy with Magistrate Schwartz as charged . . . and was obviously prejudicial to the conduct of his defense, despite the trial court's "instructions to the jury not to consider the statement with regard to Constable Siegel." This is simply not so. Even if the jury had failed to disregard Schwartz's allusion to Siegel, it can hardly be said that in the eyes of the jury Siegel was incriminated by this testimony.

Moreover, even if it was error to have admitted the statement, the error was harmless "beyond a reasonable doubt," under this Court's holding in *Chapman v. California*, 386 U. S. 18 (1966). This Court has recently held that a violation of the *Bruton* principle can be harmless error. *Harrington v. California*, —— U. S. ——, ——, 89 S. Ct. 1726, 1728, (1969). It was there held that apart from the confessions of two co-defendants, . . . "the case against Harrington was so overwhelming that we conclude that this violation of Bruton was harmless beyond a reasonable doubt."

Siegel was convicted of false pretenses in assessing certain charges in the execution of judgments entered against debtors by Schwartz in small claims brought before the

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Magistrate by Siegel and Active Collection Agency. (Indictments Nos. 893, 896, 989, 900). He was also convicted of conspiracy with Schwartz to commit various offenses related to the handling and disposition of the small claims (No. 880). The conspiracy conviction was based on the Act of June 24, 1939, P. L. 872, §302, 18 Pa. Stat. Ann. §4302, which provides:

> Any two or more persons who falsely and maliciously conspire and agree to cheat any person of his moneys, goods, chattels, or other property, or the prejudice of another, are guilty of conspiracy.

Where the conduct of the alleged conspirators indicates that they were acting together with a common, corrupt purpose, the jury may properly infer the existence of a conspiracy. *Commonwealth v. Albert,* 151 Pa. Superior Ct. 184 (1943); *Commonwealth v. Rosen,* 141 Pa. Superior Ct. 272, (1940). The facts Siegel may have had some stock in ACA, that his salary went up when Schwartz was appointed Magistrate in 1960, that he really ran the business, that he handled the Bell accounts, or that it was his office that added on the interest did not constitute evidence that Schwartz and Siegel were acting together with a common and corrupt purpose from which the jury might properly infer the existence of a conspiracy. None of these statements incriminated Siegel under the false pretense or conspiracy charge, because none of them indicated any impropriety on Siegel's part. To say the least, it is difficult to envision how the mere establishment of some relationship between Schwartz and Siegel (a relationship never concealed and readily proven by other evidence) made any contribution to Seigel's conviction.

The constitutional principle expounded in *Bruton* is not an empty shell. Rather, as indicated by this Court's holding in *Harrington,* it is a right which comes into play only after there is at least a reasonable possibility that the erroneously admitted statements may have incriminated the complaining defendant. It was decided in *Bruton* that the state's interest

in conducting joint trials to preserve economy, avoid delay, minimize the burden on witnesses, and the like, must not come at the expense of one of the defendant's constitutional rights. Respect for a citizen's constitutional safeguards, however, should not subvert a legitimate state interest by route of wild speculation. It should not do so here. Incriminating evidence against Siegel from other sources was overwhelming.

Thus, it was not Schwartz's statement which proved the existence of his sole proprietorship in the Active Collection Agency (R. 190a). Nor was it the statement that indicated that Siegel was first appointed deputy constable by the then constable Schwartz or that Siegel continued to work as a constable after Schwartz was elected to his post in the minor judiciary (R. 182a-188a). Schwartz in his statement was unclear whether Siegel had a stock interest in the corporate Active Collection Agency, but the record otherwise indicated clearly that he did have such an interest and that his income as recorded on the corporate tax returns mounted rapidly (R. 191a-193a, 225a-230a). As to the damaging and unlawful activities of Active Collection Agency, this was proved not by the Schwartz statement, but by the direct testimony of the victims of the scheme.

Thus, for example, the testimony of John Ford established that Siegel collected $38.96 from him as payment for his $14.36 debt to the Lavino Shipping Company (R. 272a-278a). The testimony of Mrs. Dolores Smith demonstrated that Siegel and Schwartz added an unauthorized $12.00 interest charge to her $48.00 telephone bill (R. 419a-425a). Another aggrieved Bell Telephone debtor was Gustav Huston who was compelled to pay $42.91 on his $37.91 debt (R. 461a). Similarly, the testimony of Mrs. Muriel Witts showed that Siegel collected $129.00 in satisfaction of her $105.00 debt owed to the J. C. Penny Company (R. 483a-490a). The testimony of 73-year-old Mrs. Anna Moyall showed that she was charged an unauthorized interest charge on her debt owed to the Savrin Coal and Coke Company (R. 549a-560a).

Again, Lawrence Crockin paid Siegel $31.00 to satisfy his $23.00 debt owed to the Atlantic Refining Company (R. 653a-655a).

It is clear then that the inference of Siegel's guilt was derived from the above type of damaging testimony rather than from Schwartz's statement concerning their association. Any remote possibility that Siegel was prejudiced by Schwartz's statement was sufficiently expunged by the charge of the court and, therefore, petitioner Siegel's right to due process of law under the fourteenth amendment has not been violated.

Petitioner Schwartz argues that he is also entitled to reversal under the *Bruton-Roberts* doctrine. He claims that under *Bruton* the state has a choice of conducting a joint trial and not introducing the statements of a co-defendant or conducting separate trials and introducing the statements. Since the Commonwealth did both, runs the argument, it gained the illegal advantage over Schwartz of the admissibility of the statement, "as well as the inferences resulting from the joint trial . . ."

The fallacy of this contention is that the Commonwealth has gained no illegal advantage over Schwartz. He has not been harmed and has no standing to object. *Bruton* only vindicates the right of a co-defendant who is denied the opportunity to confront his accuser via cross-examination. Since Schwartz's own confession was admitted, he was never in a position to demand cross-examination of "his accuser." Schwartz implicated himself and had the right to take the stand to deny his statement at any time. It is noteworthy that Schwartz's statements could have been admitted *against him* at a joint or a separate trial. And rather than having suffered from "the inferences resulting from the joint trial," the more reasonable supposition is that Schwartz could only profit from any possibility of transfering his guilt to Siegel and from the testimony of Siegel's defense witnesses.

II. THE DECISION OF THE PENNSYLVANIA SUPREME COURT IS NOT CONTRARY TO THE DECISION OF THIS COURT IN BOUIE V. CITY OF COLUMBIA.

The Supreme Court of Pennsylvania affirmed the conviction of Magistrate Schwartz on indictments charging him with committing the common law offenses of misbehavior in office (Nos. 881-882), official oppression (Nos. 881-883) and malfeasance (Nos. 881-885): ... by willfully, knowingly, and corruptly issuing civil summonses and sitting in judgment upon the civil cases set forth and at the dates set forth in the attached list, with the knowledge that his wife, Lillian Schwartz, was an officer and principal owner of the Active Collection Agency, Inc., which then and there was the collection agency or sub-agent of the various creditors of said claims, would obtain a direct pecuniary benefit from the results of the said cases by receiving a commission on all judgments and costs paid by the alleged debtors, and that he, therefore, would indirectly benefit thereby.

Petitioner Schwartz contends here, as he has throughout this litigation, "that Bills of Indictment Nos. 881-883 and 885 were unconstitutionally vague and indefinite and that his conviction thereon violated the due process and ex post facto clauses of the United States and federal constitutions." According to Petitioner Schwartz, there is no judicial precident in Pennsylvania prohibiting the conduct charged herein. It is his contention that since the state courts could find no established common law crime to fit the facts of this case, they retroactively created a new crime which did, thus violating the principles set down by this court in *Bouie v. City of Columbia,* 378 U. S. 347 (1964). The *Bouie* case held that "if a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be given retroactive effect. Petitioner Schwartz contends that this principle "a fortiori" restricts the judicial creation of new common law crimes.

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Petitioner Schwartz's assertion that there is no exact precedent prohibiting his conduct demands too much of the common law and overlooks the fact that such conduct has always been a common law crime. *King v. Davis,* Lofft 63, (1772).

It is a general principle of Pennsylvania law that the common law remains in force unless abrogated by statute and an act not prohibited by statute may be indictable at common law. Section 1010 of the Pennsylvania Penal Code, 18 Pa. Stat. Ann. §5010, specifically provides that in Pennsylvania common law crimes remain in effect, that:

> every offense now punishable either by the statute or common law of this Commonwealth and not specifically provided for by this act shall continue to be an offense punishable as heretofore.

Moreover, although it is, of course, true that courts do not have the right to invent new crimes, they do have the right to ascertain and declare the common law, whether it be criminal or civil. *State v. Schleifer,* 99 Conn. 432, 121 Atl. 805 (1923). This is a necessary and expedient right because the common law is not an inflexible set of rules; the common law is compromised of fundamental principles and reasons, and a system of legal logic adapts them to varying circumstances. Here, the Pennsylvania state courts merely ascertained the common law and logically applied it to a specific pattern. That misbehavior in office, official oppression and malfeasance are and have always been common law crimes is readily apparent from a glance at Pennsylvania case law. Thus, *Commonwealth v. Evans,* 190 Pa. Superior Ct. 179, aff'd, 399 Pa. 387 (1959), defines the crime of *misbehavior in office* in detail:

> Misbehavior in office is a common law offense. *Commonwealth v. Brownmiller,* supra, 141 Pa. Superior Ct. 107, 120, 14 A. 2d 907. The offense occurs when there is a breach of a positive statutory duty or the performance by a public official of a discretionary set with an improper or corrupt motive ... In its penal sense, mis-

> behavior in office does not encompass mere errors in judgment or departures from sound discretion, but an official must perform those official duties which require the exercise of a sound discretion to the interest of the Commonwealth and not capriciously, arbitrarily, and with a willful and corrupt design ... The willful and corrupt motive need not arise from personal benefit.

Similarly, in *Commonwealth v. Miller*, 94 Pa. Superior Ct. 499, 507, 508 (1928), the defendant, a police captain, was indicted for *malfeasance* after directing that a charge against a criminal defendant be reduced. To the court,

> this amounted to no less than favoritism in the enforcement of the criminal law by one whose duty it was to enforce it impartially. Such an act strikes at the very fundations of our institutions.

The court commented on the nature of the offense:

> The offense of malfeasance in office is similar to common law extortion in some respects. Both offenses involve an abuse of public justice and both can be committed only by a public officer. Official oppression is a common law crime peculiarly applicable to magistrates. This crime is proscribed in Article I, Section 10 of the Pennsylvania Constitution which states that "No person shall, for any indictable offense, be proceeded against criminally by information, except ... or by leave of the court for oppression or misdemeanor in office." Blackstone, Book 4, Ch. 10 was quoted on the nature of these common law crimes in *Commonwealth v. McHale*, 97 Pa. 397 (1881):
>
> There is yet another offense against public justice, which is a crime of deep malignity; and so much the deeper, as there are many opportunities of putting it into practice and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the oppression and tyrannical partiality of judges, justices, and other magistrates

in the administration and under the colour of their office.

The recent case of *Commonwealth v. McKarski,* 208 Pa. Superior Ct. 376 (1966), reviewed a number of decisions of this state which define what a common law offense is:

In *Commonwealth v. McHale,* 97 Pa. 397, 408 (1881), the Supreme Court said . . ."We are of the opinion that all such crimes as especially affect public society are indictable at common law. The test is not whether precedent can be favored in the books, but whether they injuriously affect the public policy and economy."

In *Commonwealth v. Mochan,* 177 Pa. Superior Ct. 454, 458, 110 A. 2d 788 (1955), this court said: "Any act is indictable at common law which from its nature scandalously affects the morals or health of the community."

In *Commonwealth v. Miller,* 94 Pa. Superior Ct. 499, 507 (1928), it was said: "The common law is sufficiently broad to punish as a misdemeanor, although there may be no exact precedent, any act which directly injures or tends to injure the public to such extent as to require the state to interfere and punish the wrongdoer, as in the case of acts which injuriously affect public morality, or obstruct, or pervert public justice, or the administration of government."

In *Commonwealth v. Orris,* 136 Pa. Superior Ct. 137, 146, 7 A. 2d 88 (1939), it was said: "Among the offenses described as misdemeanors at common law are those less than felony, but such 'trespasses against good morals' as tent 'to outrage decency.' "

These principles are expressed in the common law crimes of misbehavior in office, malfeasance, and official oppression, crimes which, contrary to petitioner's contention, have been applied to specific conduct effectively identical to petitioner's. See, *e.g., Commonwealth v. Evans; Commonwealth v. Miller,* supra. Petitioner's demand for judicial precedent which explicitly prohibits a magistrate from continually dis-

posing of cases in which his wife has a direct and he himself an indirect interest in the outcome is a mockery and misunderstanding of the common law. It confuses the genus of the crime with its specie and would require a compendium of the infinite possibilities of factual circumstance from man's finite imagination. To say that this common law crime fails to gave a person of ordinary intelligence fair notice that his contemplated conduct is forbidden ignores the moral turpitude involved and the glaring fact that a magistrate is in a position where he is bound to know. Petitioner's position is like arguing that the Pennsylvania law prohibiting larceny does not give notice that it prohibits the theft of automobiles or airplanes because none of the common law decisions defining larceny concern those as yet uninvented objects.

Petitioner's contention fails for yet another reason. The ex post facto clause of the Constitution has always been a restraint solely on the legislative power. It was held by this Court in *Frank v. Mangum*, 237 U.S. 309, 344 (1915), that "... it is sufficient to say that the constitutional provision: 'No state shall ... pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts,' as its terms indicate, is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts." The *Bouie* decision merely extends application of the ex post facto clause to those situations where *legislation* receives an "unforseeable" and "indefensible" interpretation by a court. It does not extend application of the ex post facto clause to cases, such as the one under consideration, where no legislation is involved. Consequently, the decision of the Pennsylvania Supreme Court, even if it had not been supported by ample precedent, is not contrary to the decision in *Bouie v. City of Columbia*.

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III. THE AFFIRMANCE OF PETITIONER'S CONVICTION BY AN EQUALLY DIVIDED VOTE OF THE PENNSYLVANIA SUPREME COURT DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

It is a general principle that the right to appellate review is a privilege to be granted by the legislature. It must be granted or denied on a nondiscriminatory basis but need not be granted at all. See, *e.g.*, *Griffin v. Illinois*, 351 U. S. 12 (1956). The Pennsylvania legislature has, however, granted an appeal as of right to all persons convicted of the crimes charged in these indictments. That appeal is to the Superior Court of Pennsylvania and was exercised by both petitioners whose convictions were affirmed by a 6-0 vote of that court. The legislature has further provided that a second level of appeal may be sought by means of a petition of allowance of appeal from the Superior to the Supreme Court of Pennsylvania, a system resembling this Court's power to review the judgments of the federal courts of appeals on writ of certiorari. This second level of appeal was sought and review granted in this case. Argument was had before the full Supreme Court of Pennsylvania. Before the decision of this case, one of the justices who had heard argument died. Thereafter, the decision of the Superior Court was affirmed by the Supreme Court. One justice dissented as to both appellants and two additional justices dissented with respect to appellant Siegel. Thus, it is clear that petitioner Siegel's conviction, but not petitioner Schwartz's, was affirmed at the second level of appeal by an equally divided court.

Affirmances by an equally divided appellate court are, of course, common wherever an appellate court for any reason—death, disqualification, illness or absence of one or more judges or the creation of a court with an even number of judges, to suggest a few examples—cannot produce a majority either to reverse or affirm. Such affirmances occur

even in this Court and even in criminal cases presenting close and important constitutional questions. See, *e.g.*, *Biggers v. Tennessee*, 390 U. S. 404 (1968). Thus, there is no general constitutional prohibition against such affirmances.

The only possible constitutional question which might be presented by this issue, then, is whether this case represents a discriminatory application of the normal power to affirm by an equally divided court to the case against petitioner Siegel.

The Pennsylvania Legislature has provided that when a majority of Pennsylvania Supreme Court justices convene for a purpose agreeable to law, they have power to hold court. Act of April 14, 1834, P. L. 333, §2, 17 P. S. §10. The fact that Article V, §2, of the Pennsylvania Constitution provides that the Supreme Court "shall consist of seven judges" does not invalidate this legislative mandate. Article V, §2, merely creates a court of seven judges and does not purport to require a full court to conduct the business of the court. Moreover, the court has ruled that it has the power to continue to conduct its business despite the death of one of the justices provided a quorum remains. *Commonwealth v. Petrillo*, 340 Pa. 33 (1940). In fact, Mr. Justice Thompson ruled in *Commonwealth v. Mathues*, 210 Pa. 372, 422 (1904), that when only a single justice is not disqualified from sitting in a case, the whole power of the court devolves on that justice.

In accordance with normal procedure, the Pennsylvania Supreme Court has repeatedly handed down decisions by an equally divided court. See, *e.g.*, *Commonwealth v. Simon*, 432 Pa. 386 (1968); *Windisch v. Babcock and Wilcox*, 412 Pa. 558 (1963); *Ellis v. Dubin*, 396 Pa. 81 (1959). The rule, as that court said in the *Appeal of Madlum*, 103 Pa. 584 (1883), is: "The court was therefore equally divided, and the rule in such cases is that no valid order or decree can be made. If there is a motion before the court it falls. This is the rule everywhere, and it requires no argument to vindicate it. The only order we can make in such a case is to affirm the judgment or decree of the court below ... An affirmance

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here by a divided court means merely that the judgment or decree below cannot be disturbed."

Petitioners have been accorded a fair and impartial trial and review in two courts of Pennsylvania. Since review in the Pennsylvania appellate courts was fair and orderly and no substantive or procedural constitutional rights were violated, a decision by a divided supreme court has not denied them due process of law.

CONCLUSION.

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari to the Supreme Court of Pennsylvania be denied.

Respectfully submitted,

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